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No. 09-960

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit held that the hundreds of Indian tribes in Alaska have the authority to initiate and adjudicate child custody proceedings involving nonmembers domiciled outside of Indian country and to compel the State to give full faith and credit to the decrees entered in such proceedings. Respondents firmly embrace that decision, and devote their efforts largely to arguing that it is "unremarkable." Opp.2. That contention cannot withstand scrutiny. Indeed, even respondents let slip that the basic question presented is "one of extraordinary importance to Alaska." Opp.9. And the far-reaching and real-world jurisdictional consequences of this case for the State of Alaska, its tribes, and, most importantly, the thousands of Alaskan children of mixed Alaska Native heritage (*see* Pet.10-15, 25-30) are undeniable—and thus go almost entirely unaddressed by respondents.

The significance of the Ninth Circuit decision is underscored by its departure from this Court's cases. This Court has repeatedly rejected efforts by Indian tribes "to regulate nonmembers, especially on non-Indian fee land." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008); *see* Pet.16-20. Respondents suggest that these precedents do not apply to the child custody context. But the only instance in which the Court has recognized inherent tribal sovereignty over an adoption is "when *all* parties belonged to the Tribe and resided on its reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (emphasis added) (citing *Fisher v. District Court*, 424 U.S. 382, 386 (1976)). In stark contrast, the Ninth Circuit holds that tribes have

inherent authority over child custody proceedings involving *nonmembers outside Indian country*.

Respondents try to manufacture a "vehicle" (Opp.7) issue by arguing—for the first time in this case—that the nonmember father "consented" to the termination of his parental rights. Opp.4. But that issue is a red herring. This Court has previously held that parents may not consent to the subject-matter jurisdiction of an improper forum in the context of the adoption of an Indian child. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). And, in any event, this case was decided on the premise that the custody proceeding at issue was neither "voluntary, nor among [tribal] members," Pet.App.16a, and respondents' position all along has been that the "voluntary" versus "involuntary" nature of a child custody proceeding "does not alter inherent tribal court jurisdiction" over such a proceeding. Appellees 9th Cir. Br.31. It is too late in the day for respondents to back track now.

In short, the question presented not only is undeniably important, it is squarely before the Court.

ARGUMENT

A. THE UNDENIABLE IMPORTANCE OF THIS CASE ALONE CALLS FOR REVIEW BY THIS COURT

When they are not attempting to avoid certiorari in this Court, respondents have recognized that this is a "very important" case. National Indian Law Library, Native American Rights Fund, *NARF Wins Case for Alaska's Tribal Children*, Mar. 26, 2008, *available at* http://narfnews.blogspot.com/2008/03/narf-wins-sse-for-alaskas-tribal.html. And it is easy to see why. The case concerns the authority of the State and the more

than 200 Indian tribes in Alaska over a matter that all agree is of fundamental importance—"[c]hild welfare" (Opp.28) and "parental rights" (Opp.5).

Moreover, because of Alaska's unique demographics and history, the decision below will have significant practical consequences for thousands of parent-child relationships in Alaska. Pet.11-15. If allowed to stand, over 200 tribes in Alaska will have geographically unbounded power to terminate the parental rights of nonmembers even when they and their children live outside Indian Country. Nonmember parents could be forced to defend their parental rights in far-away tribal forums where the Bill of Rights does not apply, and would be without any right to counsel or the benefit of other procedural protections mandated by the Indian Child Welfare Act (ICWA) or state law. Pet.26-29. And because substantial consequences turn on whether the tribe or parent establishes jurisdiction first, both tribes and parents will be incentivized to race to initiate child custody proceedings in their favored forum. Pet.25-26.

Alaska's children stand to lose the most under this jurisdictional regime. They will suffer when parents and tribes rush to litigation, and from the prolonged custody battles that will result when nonmember parents challenge the legitimacy of unfavorable tribal court rulings in state court. Pet.26, 29-30. Meanwhile, Alaska's courts will face the arduous task of sorting out whether or to what extent the custody orders of some 230 distinct legal regimes from tribes around the State are entitled to full faith and credit. Pet.29.

Respondents concede that such consequences are "untoward," but claim that they are merely "hypothetical." Opp.34. But the petition pointed to

numerous cases where the question presented has already arisen. And amici (at 2-6) point to still additional cases in which the question presented is recurring.[1] These cases underscore the real prospect of orders issued by far-away tribal courts purporting to terminate the custody of nonmember parents residing outside Indian country; little or no notice or procedural protections for nonmember parents in such proceedings; and prolonged disruption to the lives of the Alaskan children and families involved.[2]

These cases are far from outliers. As noted in the petition, Alaska's child protection service is currently overseeing *hundreds* of active cases involving children whose parents are members of different tribes. Pet.4. The question presented is therefore of immense practical importance to Alaska and its citizens.

B. THE NINTH CIRCUIT'S DECISION SHARPLY CONFLICTS WITH THIS COURT'S PRECEDENTS

Although respondents spare no effort in attempting to defend the decision below, they fail to account for the fact that the Ninth Circuit's conception of tribal authority is flatly at odds with this Court's precedents.

1. As respondents acknowledge (Opp.1-2), the decision below is grounded on the Ninth Circuit's

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[1] *Evansville Village v. Taylor*, No. 4FA-10-1226CI (Alaska Sup. Ct. filed Feb. 10, 2010); *Parks v. Simmonds*, 4FA-09-2508CI (Alaska Sup. Ct. filed Sept. 17, 2009).

[2] Respondents are correct that there is no reason for this Court to expand the question presented to address the additional issues discussed by amici. Pet.17 n.12. But that in no way diminishes the importance of the jurisdictional question that is presented.

decision in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) ("*Venetie I.R.A. Council*"). Respondents argue that the fact that *Venetie I.R.A. Council* was decided 20 years ago is a *virtue*. Opp.1-2. But that decision has only grown more anomalous with time. Indeed, since *Venetie I.R.A. Council* was decided, this Court has held that Alaskan tribes do *not* occupy Indian country, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), and has repeatedly rejected "the extension of tribal civil authority over nonmembers on non-Indian land," *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit's rule that Alaskan tribes have authority to initiate and adjudicate child custody proceedings involving *nonmembers outside Indian country* is fundamentally out of step with those precedents.

Respondents attempt to defuse this clear conflict by pointing out that this Court has observed that tribes have authority to "'regulate domestic relations *among members*.'" Opp.28 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)) (emphasis added). But far from empowering tribes to adjudicate the rights of *nonmembers* in such proceedings, this Court has specifically recognized that *Montana*'s "domestic relations *among members*" language means just that—explaining that the lone case that *Montana* cited for that proposition involved the authority of a "tribal court over an adoption proceeding when *all parties belonged to the Tribe and resided on its reservation*." *Strate*, 520 U.S. at 458 (emphasis added) (citing *Fisher*, 424 U.S. at 386); *see also Plains Commerce Bank*, 128 S. Ct. at 2718 (citing *Fisher* to support same language).

Throughout their opposition, respondents attempt to blur the critical distinction between the exercise of jurisdiction over *members* versus *nonmembers*. Thus, they rely on case law stating that Alaskan tribes may "'resolve domestic disputes between *their own members*.'" Opp.10 (quoting *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000)) (emphasis added). And they attempt to draw significance from the fact that Alaska has recognized tribal sovereignty over adoptions *among members*. *See* Opp.10-15 & App.1-4. But as this Court's precedents underscore, the jurisdictional equation is fundamentally different when, as here, a tribe is attempting to assert jurisdiction over *nonmembers*.

Respondents also suggest that the status of the child must control—and that the status of the parents is irrelevant, even when, as here, the proceeding involves the termination of parental rights. Opp.26. But of course, that argument is contradicted by the Court's recognition in *Strate* that "*all* parties belonged to the Tribe" in the one instance in which the Court has recognized tribal sovereignty over child custody proceedings. 520 U.S. at 458 (emphasis added). And it is further contradicted by this Court's precedents recognizing the common-sense principle that *parents* have independent—and constitutionally recognized—interests in such proceedings. *See* Pet.19. Respondents do not even attempt to address those cases.[3]

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[3] Respondents point to various lower court cases applying ICWA. *See* Opp.29-30 & n.6. But *none* of those cases suggest that tribes have inherent sovereign authority over nonmembers outside Indian country. And, as respondents conceded below, a

2. Respondents mischaracterize the way in which the Alaska courts have struggled with this issue. Opp.12-13. Far from the picture of "uniform[ity]" that respondents try to paint (Opp.13), the Alaska courts—like the Alaska Executive Branch, Pet.22 n.15—have flipped flopped on the issue. Indeed, the Alaska Supreme Court initially held that Alaskan tribes *lack* sovereignty over child custody disputes and explicitly rejected the Ninth Circuit's decision in *Venetie I.R.A. Council*. *See In re F.P.*, 843 P.2d 1214, 1216 (Alaska 1992). But the court later changed course and has since stated that Alaskan tribes have inherent power to adjudicate child custody disputes "between *tribal members*." *John*, 982 P.2d at 743 (emphasis added).

In any event, only this Court can address the Ninth Circuit's precedent. As long as this case and *Venetie I.R.A. Council* are the law of the Ninth Circuit, then—no matter what the Alaska courts say—tribes can always go to federal court and demand that decrees in proceedings involving nonmembers be given effect, as respondents did here. No "development" (Opp.32) of Alaska law can change that. And especially in light of the undeniable importance of the question presented and the fact that the Alaska courts have struggled with these issues for years, there is no reason to postpone this Court's review of the question presented.[4]

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tribe's statutory authority to receive a case transferred from state court pursuant to ICWA § 1911(b) does not address the scope of a tribe's inherent sovereign authority to initiate proceedings against nonmembers outside Indian country. Pet.25 n.16.

[4] Respondents claim (Opp.33) that this Court denied certiorari "to review the same issue" in *John v. Baker*. Not so. The petition in *John* challenged whether Alaskan tribes were properly

3. Respondents also fail to account for the conflict between the decision below and ICWA. Pet.22-25. Indeed, the Ninth Circuit's decision dismantles the scheme carefully crafted by Congress in ICWA—with the interests not only of tribes, but of parents and children and States in mind. The decision authorizes a tribe that lacks the land base necessary to invoke the "exclusive jurisdiction" provision in § 1911(a) to *bypass* the "transfer" provision in § 1911(b) and initiate a child custody proceeding directly in tribal court. And as a result, the Ninth Circuit's decision deprives parents, including nonmembers parents, of the veto right that Congress gave them over tribal court involvement, not to mention numerous other protections. Pet.23-24.

More fundamentally, respondents fail to account for the fact that it was *not* Congress' intent "to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." H.R. Rep. No. 95-1386, at 19 (1978); *see also In re Greybull*, 543 P.2d 1079, 1080 (Or. 1975) (cited approvingly in H.R. Rep. No. 95-1386, at 21) ("The general rule is that Indians domiciled off their reservation are subject to state laws."). Yet the Ninth Circuit's rule does precisely that—permitting the 200-plus Alaskan tribes to oust the State of its jurisdiction over thousands of nonmember parents outside Indian country.

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recognized by the federal government at all. *John* Pet.i (No. 99-973). This case concerns the authority of Alaskan tribes over nonmembers residing off-reservation in child custody proceedings—a quite different matter. Pet.17 n.12.

C. THIS CASE PRESENTS A TIMELY VEHICLE TO DECIDE THE IMPORTANT QUESTION PRESENTED

1. Respondents' effort to avoid certiorari by attempting to manufacture a "vehicle" (Opp.7) issue also fails. Respondents' principal ploy is to argue—for the first time in this case—that the nonmember father and nonmember adoptive parents "consented" to the tribe's jurisdiction and that such consent eliminates any objection to the tribe's subject-matter jurisdiction over the adoption proceedings. Opp.4. That argument not only has been waived because it was not raised below, but it is fundamentally flawed on several levels.

This Court has already rejected the proposition that parents may "voluntarily surrender" to the subject-matter jurisdiction of an improper forum in an Indian child custody proceeding. *Holyfield*, 490 U.S. at 49. In *Holyfield*, Indian parents sought to consent to a state court adoption proceeding; the rule is no different when parents (allegedly) seek to consent to a tribal court adoption proceeding. And that rule squares with the hornbook rule that consent or waiver is *never* sufficient to confer subject-matter jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); 2 James Wm. Moore, *Moore's Federal Practice* § 12.30[1] (3d ed. 2009) ("Lack of subject matter jurisdiction ... may not be waived.").

That settled rule is a complete answer to respondents' argument. But in any event, this case was decided by the courts below on the premise that the adoption proceeding was *not* "voluntary." Pet.App.16a. Respondents never disputed that the proceeding at issue was involuntary before the Ninth Circuit or once argued that the nonmember parents

consented to the adoption. To the contrary, respondents argued that the voluntary versus involuntary nature of a case has no bearing on a tribe's subject-matter jurisdiction. Appellees 9th Cir. Br.31 ("The Commissioner's 'voluntary vs. involuntary' distinction makes no sense ... and finds no support in federal Indian law.").

And if consent were ever a relevant consideration, the requisite consent is plainly lacking here. The record indicates that the nonmember father (who was not represented by counsel) was unable to attend the proceedings. Opp.App.12 (¶7). But the momentous decision to relinquish one's parental rights cannot be effected by an unrepresented Indian parent's mere failure to attend to a hearing, or to object to such a proceeding. One of the chief concerns that Congress sought to address in ICWA was the absence of adequate consent—and the uninformed waiver of parental rights. *See* H.R. Rep. No. 95-1386, at 11 ("[T]he voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children."); *id.* at 31 ("Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.").

Congress addressed this concern by mandating that indigent Indian parents were entitled to counsel, 25 U.S.C. § 1912(b), and that no case could be transferred to tribal court without a stringent judicial inquiry into consent, *id.* § 1913(a). Those requirements applied even where it was clear that the tribal court would have subject-matter jurisdiction over the proceeding. Even if a nonmember parent could consent to a tribe's subject-matter jurisdiction over the termination of his

parental rights, no less demanding standard would be warranted. And section 1913(a)'s requirements were indisputably not satisfied as to the nonmember parent.

2. Respondents say that "the State ... never raised" the issue of "involuntary tribal jurisdiction over non-member Indians" below. Opp.8. That is incorrect. In the district court, the State clearly argued that "[Alaskan] tribes have no inherent authority to *initiate* child protection proceedings affecting the rights of non-members domiciled off-reservation." Alaska Mot. Summ. J.26; *see* Pet.App.16a. Likewise, in the Ninth Circuit, the State argued that the tribe lacks jurisdiction over "involuntary child protection matters involving nonmember parents." Appellants 9th Cir. Br.48 (heading); *see also* Appellants 9th Cir. Reply Br.17 ("[T]he nonmember father was involuntarily involved as a defendant ...."); *accord id.* at 6-7, 25-26. The courts below rejected that argument. The district court held that the "voluntary versus involuntary" nature of an adoption proceeding is irrelevant, Pet.App.16a, and the Ninth Circuit affirmed without correcting that erroneous legal holding.

Respondents' suggestion (Opp.23) that the State somehow "chose to defer to the Kaltag Tribal Court" is likewise unfounded. The tribe gave the State no notice before initiating this case in tribal court, and the State was not informed of the tribal court's decree in this case until respondents demanded that the State recognize that decree. Since then, the State has consistently—and vigorously—challenged the tribe's

jurisdiction to enter that decree involving nonmember parents outside Indian country.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] Respondents also suggest that certiorari is not warranted because the underlying adoption occurred several years ago. Opp.4. But child custody cases typically take several years to reach this Court. *See, e.g.*, *Holyfield*, 490 U.S. at 53 (three years); *Abbott v. Abbott*, 542 F.3d 1081, 1082 (5th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (June 29, 2009) (No. 08-645) (pending) (five years). The ongoing placement may be considered on remand, *Holyfield*, 490 U.S. at 53-54, but provides no basis to deny review of the important question presented. And because the question presented affects potentially thousands of Alaskan children and families, this Court's review is urgently needed.